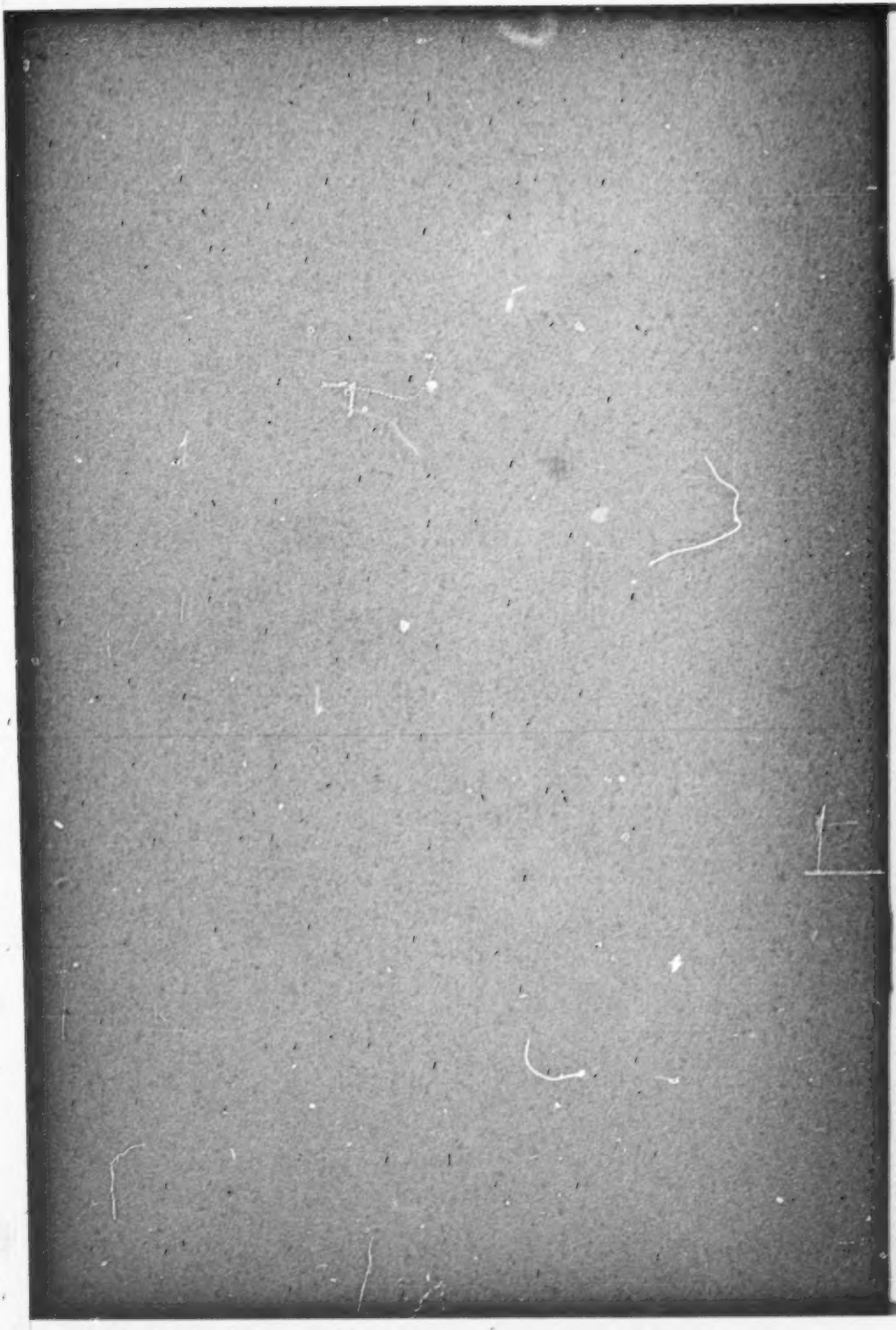

SUPREME COURT, U. S.

FILED

MAY 23 1975

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1425

WILLIAM STEINMAN,

Petitioner,

against

MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

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WILLIAM STEINMAN,

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MAURICE H. NADJARI, individually and as Special Deputy Attorney General of the State of New York,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

Preliminary Statement

Petitioner William Steinman seeks a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, entered April 14, 1975, unanimously affirming a judgment of the United States District Court for the Eastern District of New York, entered December 12, 1974, dismissing petitioner's complaint for de-

claratory and injunctive relief to bar a pending criminal prosecution against him in the Extraordinary Special and Trial Term of the New York State Supreme Court, Kings County.

Opinions Below

The unreported opinions of the United States District Court for the Eastern District of New York are reprinted in the appendix to the Petition at pages A-1-12. The judgment and oral opinion of the United States Court of Appeals for the Second Circuit are reprinted in the supplemental appendix to the Petition at pages SA-1-4.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 14, 1975, and the Petition was filed within 90 days of that date. Petitioner invokes this Court's certiorari jurisdiction pursuant to 28 U.S.C. §1254(1).

Question Presented

Whether a defendant in a pending state criminal prosecution is barred from enjoining his prosecution on the grounds of alleged prosecutorial misconduct and the alleged unconstitutionality of various state statutes when those same issues may be raised in his state trial and in the state appellate courts.

Statutes Involved

The pertinent federal and state constitutional and statutory provisions are set forth in the Petition at pages 3-9.

Statement of the Case

The investigation, arrest and indictment of William Steinman*

In the early part of 1973, members of the Office of the United States Attorney for the Southern District of New York learned from Nicholas DiStefano, a federal informant, that petitioner William Steinman, Administrative Assistant to the Comptroller for the State of New York, had agreed to receive money to illegally influence the actions of public agencies and officials (Federman affidavit, June 25, 1974, p. 49).** The United States Attorney began an investigation of Steinman with the cooperation of the New York City Police Department (*ibid.*). Pursuant to this investigation, the prosecutors caused Virginia Morgan, a federal agent, to be arrested in Kings County for the crime of possession of a weapon (*id.* at 42). Thereafter, from February 20, 1973, until September, 1973, DiStefano, working as an undercover agent, met with Steinman several times concerning disposition of the Morgan case (*id.* at 49-50).

In August, 1973, the United States Attorney determined that the investigation fell within the jurisdiction of state law enforcement agencies, and transferred it to the office of respondent, Maurice H. Nadjari, the Special

* Many of the facts in this case, including the circumstances of the arrest and indeed the guilt or innocence of petitioner, are subject to dispute, and have yet to be resolved at evidentiary hearings at the state level.

** Parenthetical page references, unless otherwise indicated, are to the appendix filed by petitioner in the Court of Appeals. In the event that the original record and not the appendix is transmitted to this Court, the documents referred to in these pages are also identified.

State Prosecutor (*id.* at 50). The investigation then continued, partly with the use of court-ordered wiretaps (*id.* at 50-51). Finally, on September 25, 1973, Steinman was discovered near the Kings County Supreme Court House with $5,000 in cash in his pocket (*id.* at 51). According to the affidavit of Special Assistant Attorney General Mark Federman, Steinman at first agreed to furnish the prosecutors with information on corruption within the New York City criminal justice system; in December, 1973, he refused to cooperate further (*id.* at 51-52).

By an indictment filed December 18, 1973 (*id.* at 52), the Extraordinary Special Grand Jury for the County of Kings charged Steinman with the crimes of conspiracy in the third degree [N. Y. Penal Law §105.05 (McKinney 1967)], attempted bribery in the second degree [N. Y. Penal Law §§110.00, 200.00 (McKinney 1967)] and grand larceny in the second degree [N. Y. Penal Law §155.35 (McKinney 1967)] (Indictment No. S.P.O. K-6/1973, pp. 42-44). Specifically, the indictment alleged that, after Virginia Morgan had been arrested, Steinman had conspired with others to receive $10,000, some of which would be paid as bribes to members of the criminal justice system and to two political district leaders to influence the outcome of the Morgan case (*id.* at 42). Pursuant to this conspiracy, the indictment alleged, Steinman engaged in a series of overt acts, in which he had discussed the Morgan case with an unidentified individual (February 20, 1973), stated that he would contact a public official in the criminal justice system, who would affect the Morgan case (May 21, 1973), obtained a list of officials in the criminal justice system in Kings County (May 21) and displayed such a

list to another person (May 29), spoke to a public official in the criminal justice system concerning the Morgan case (July 3), received $1,000 in cash at a restaurant (August 13), stated that he had met and conferred with a second public official (August 14), discussed the Morgan case with a third official (August 16), stated that he had spoken to two political district leaders concerning the case (September 6), and received $5,000 in cash near the Kings County Supreme Court House (September 20) (*id.* at 43).

The proceedings in the Appellate Division

By permission granted January 25, 1974, pursuant to section 149, subdivision 2, of the New York Judiciary Law, Steinman moved in the Appellate Division of the New York Supreme Court, Second Department, for an order dismissing the indictment in the interest of justice, dismissing the indictment on the ground that the Special Prosecutor had abused his statutory power and authority, disqualifying the justice of the Extraordinary Special and Trial Term of the Supreme Court from presiding at his trial, superseding and disqualifying the Special Prosecutor from prosecuting his case, granting discovery, and impounding tape recordings of intercepted conversations (Nussbaum affidavit, June 10, 1974, pp. 26-28). On the issue of prosecutorial misconduct and abuse of power, Steinman alleged that the Special Prosecutor had entrapped him by use of a "manufactured" crime (*id.* at 29-33), that he had released to the press portions of the prosecutor's brief and affidavit in the Appellate Division in apparent violation of an order of that court that the papers before it be sealed (*id.* at 35-36), and that a member of the prosecutor's staff,

during oral argument, had misrepresented to the Appellate Division that former Chief Judge FULD of the New York State Court of Appeals had sanctioned the use of "mock arrests," when in fact the judge had not done so (*id.* at 36-37).

The Appellate Division granted partial discovery and denied the rest of the motion, citing the concurring opinion of Mr. Justice SHAPIRO in *Matter of Klein* v. *Murtagh*, 44 A.D.2d 465, 473-74 (2d Dept. 1974), *aff'd*, 34 N.Y. 2d 988 (1974), that questions of prosecutorial misconduct should be decided at the trial level. *People* v. *Steinman*, 44 A.D.2d 839 (2d Dept. 1974). Steinman has since made a motion in the trial court to dismiss the indictment on, for the most part, the same grounds of prosecutorial misconduct. That motion is still pending.

The instant action for injunctive and declaratory relief

After denial of the motion by the Appellate Division and referral of the matter to the trial court, Steinman brought a civil rights action in the United States District Court for the Eastern District of New York on essentially the same grounds raised in the Appellate Division and requested declaratory judgment, a permanent injunction and the convening of a three-judge court to dismiss his "indictment as null and void under the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution" (complaint, pp. 2-9). Through a series of affidavits submitted by Steinman and his counsel, Steinman made allegations of entrapment, specifically that the Special Prosecutor had engaged in a "mock arrest" (Steinman affidavit, June 10, 1974, pp. 13-15; Nussbaum affidavit, June 10, 1974, pp.

29-33; Nussbaum reply affidavit, June 27, 1974, pp. 56-57; Nussbaum affidavit, Jul. 12, 1974, pp. 73-78) and that the Special Prosecutor and the United States Attorney for the Southern District of New York had attempted to coerce him into entrapping other public officials (Steinman affidavit, June 10, 1974, pp. 15-19; Nussbaum reply affidavit, June 27, 1974, p. 58; Steinman reply affidavit, June 27, 1974, pp. 62-67). Steinman further alleged that between his arrest and the indictment he had been denied a preliminary hearing as required by state law (Nussbaum reply affidavit, June 27, 1974, p. 58), that the Special Prosecutor had improperly released to the press portions of papers which the prosecution had submitted in the Appellate Division (Nussbaum affidavit, June 10, 1974, pp. 35-36; Nussbaum reply affidavit, June 27, 1974, p. 58), and that Chief Special Assistant Attorney General Joseph A. Phillips had misrepresented former Chief Judge FULD's approval of the arrest procedure both in the instant case in the Appellate Division and as *amicus curiae* in the United States Court of Appeals in *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973) (Nussbaum affidavit, June 10, 1974, pp. 36-37; Nussbaum reply affidavit, June 27, 1974, pp. 58-60; Nussbaum affidavit, Jul. 12, 1974, pp. 78-79; Nussbaum affidavit, Jul. 17, 1974, and exhibits, pp. 80-83).

Steinman also claimed that the Special Prosecutor had abused his authority under section 63 of the New York Executive Law and the Governor's Executive Order Number 55, and that therefore those provisions were unconstitutional as applied (Nussbaum affidavit, June 10, 1974, pp. 31-32; Nussbaum reply affidavit, June 27, 1974, pp. 55-56). Finally, he asserted that the Special Prosecutor and

the trial judge should be disqualified pursuant to section 63 of the New York Executive Law and section 149 of the New York Judiciary Law, respectively (Nussbaum affidavit, June 10, 1974, pp. 33-35). He submitted that he was irreparably injured because the trial judge could not be impartial in light of his "official association" with the Special Prosecutor (Nussbaum affidavit, June 10, 1974, pp. 37-38).

The Special Prosecutor moved to dismiss the complaint for failure to state a claim on which relief could be granted (notice of motion, p. 45). In a series of affidavits submitted by Chief Special Assistant Attorney General Joseph A. Phillips, Special Assistant Attorney General Mark I. Federman and Assistant United States Attorney Rudolph W. Giuliani, the Special Prosecutor argued that Steinman had not been entrapped (Giuliani affidavit, June 25, 1974, pp. 46-48; Federman affidavit, June 25, 1974, pp. 51-52; Phillips reply affidavit, Jul. 8, 1974, pp. 68-72), but that, in any event, the questions of prosecutorial misconduct should be resolved in the pending state prosecution, which had been brought in good faith (Phillips affidavit, June 25, 1974, pp. 53-54; Phillips reply affidavit, Jul. 8, 1974, p. 68). Mr. Phillips further stated that the information he had supplied to the Appellate Division on oral argument, to the effect that Judge FULD had approved the investigative technique in a discussion with the United States Attorney, was an inadvertent error and that he had corrected the error by submitting a letter to that court (Phillips affidavit, June 25, 1974, p. 54).

On June 27, 1974, in an oral argument before the United States District Court for the Eastern District of New York (CONSTANTINO, J.), Steinman, through counsel, contended

that a three-judge panel should be convened because the Special Prosecutor, in light of his alleged misconduct, had exceeded his authority under section 63 of the New York Executive Law and under the Governor's executive order. Counsel also noted that section 149 of the New York Judiciary Law, which provides that the Governor may appoint a Supreme Court justice to preside at an extraordinary special and trial term, is unconstitutional because it violates the federal separation of powers doctrine. By a memorandum and order dated August 8, 1974, Judge CONSTANTINO denied the application for a three-judge court on the ground that the constitutionality of the provisions cited in the complaint, to wit, section 63 of the New York Executive Law and Executive Order Number 55, had not been challenged. The court invited further briefs on the Special Prosecutor's outstanding motion to dismiss the complaint, to be thereafter treated as a motion for summary judgment. Petition, pp. A-1-5.

Both sides submitted further memoranda of law on the motion. Steinman, through counsel, filed an additional affidavit challenging the constitutionality of article VI, section 27, of the New York State Constitution and its implementing statute, section 149 of the New York Judiciary Law. He asserted that the state prosecution subjected him to irreparable injury because he was "without financial resources" to defend his case (Nussbaum supplemental affidavit, Oct. 15, 1974, pp. 94-96).

By a memorandum and order dated December 6, 1974, and an amended memorandum and order dated December 10, 1974, Judge CONSTANTINO granted the Special Prose-

cutor's motion to dismiss the complaint on the ground that the questions presented in the action could be resolved in the state proceeding. Petition, pp. A-6-12. On December 12, 1974, judgment was entered dismissing the complaint.

On appeal to the United States Court of Appeals for the Second Circuit, petitioner argued that the denial of his application for a three-judge court and the subsequent dismissal of his complaint were erroneous. The Court of Appeals (KAUFMAN, C.J., SMITH and TIMBERS, JJ.) unanimously affirmed the judgment of the District Court on April 14, 1975. Petition, pp. SA-1-4.

ARGUMENT

The proceedings below present a classic situation properly barring federal intervention in a pending state criminal prosecution.

Petitioner brought an action in the United States District Court for declaratory and injunctive relief to stay his state criminal proceeding on the grounds of prosecutorial misconduct, to wit, entrapment, failure to provide petitioner a preliminary hearing, releasing to the press court papers in apparent violation of a state court order, and misleading the Appellate Division on what former Chief Judge FULD said concerning the prosecution's investigative techniques. During the course of the proceeding, petitioner tangentially challenged the constitutionality of several state provisions. N.Y. CONST. art. VI, §27 (McKinney 1969); N.Y. Judiciary Law §149(1) (McKinney 1968); N.Y. Executive Law §63 (McKinney 1972); Exec.

Order No. 58, 9 NYCRR 1.58.* After denying an initial application for the convening of a three-judge court and receiving affidavits and memoranda of law submitted by both parties,** the District Court held that Steinman had not demonstrated the irreparable injury necessary to allow federal intervention in a pending state prosecution and granted respondent's motion to dismiss the complaint. Petition, pp. A-6-12. The United States Court of Appeals for the Second Circuit affirmed the dismissal. Petitioner seeks a writ of certiorari to review that decision.

It is now well established that, with few exceptions, a federal court, as a matter of comity, should dismiss an action for declaratory and injunctive relief when the claims submitted may be raised in a pending state criminal prosecution. *Younger* v. *Harris*, 401 U.S. 37 (1971); *Samuels* v. *Mackell*, 401 U.S. 66 (1971); *Boyle* v. *Landry*, 401 U.S. 77 (1971); *Perez* v. *Ledesma*, 401 U.S. 87 (1971); *Dyson* v. *Stein*, 401 U.S. 200 (1971); *Byrne* v. *Karalexis*, 401 U.S. 216 (1971); *Gajon Bar and Grill* v. *Kelly*, 508 F. 2d 1317 (2d Cir. 1974); *cf. Allee* v. *Medrano*, 416 U.S. 802 (1974); *Steffel* v. *Thompson*, 415 U.S. 452 (1974); *Salem Inn* v. *Frank*, 501

* Erroneously cited in the complaint as Executive Order Number 55, 9 NYCRR 1.55, by which the Governor, pursuant to section 63 of the New York Executive Law, gave the Attorney General and his deputy, the respondent herein, power to prosecute cases of official corruption in the criminal justice system in New York County. The correct order in issue, number 58, is an identical order applying to Kings County.

** In its decision of December 6, 1974, the District Court granted the Special Prosecutor's motion to dismiss the complaint and, in so doing, assumed the truth of the facts alleged by petitioner. Petition, p. A-9. However, since the court examined papers submitted by both parties and had earlier stated that it would treat the Special Prosecutor's motion to dismiss as one for summary judgment, the court's decision may be viewed as having granted summary judgment in favor of the Special Prosecutor. Petition, pp. A-4-5; *see* FED. R. CIV. P. 56; *Reilly* v. *Doyle*, 483 F. 2d 123, 125, n. 2 (2d Cir. 1973).

F. 2d 18 (2d Cir. 1974). This rule applies no matter whether the underlying basis for the claim is the unconstitutionality of a state statute or the misconduct of state officials. *See Kugler* v. *Helfant*, —— U.S. —— (Apr. 28, 1975); *Reilly* v. *Doyle*, 483 F. 2d 123, 128 (2d Cir. 1973); *Inmates of Attica Correctional Facility* v. *Rockefeller*, 453 F. 2d 12, 22 (2d Cir. 1971); *Lewis* v. *Kugler*, 446 F. 2d 1343, 1348 (3d Cir. 1971). When a state prosecution is pending, federal intervention is only allowed when the plaintiff has shown that he faces great and immediate injury [*Younger* v. *Harris, supra* at 46], or that the prosecution has been brought in bad faith or merely to harass the plaintiff [*id.* at 49], or that other "extraordinary circumstances" exist which require intervention. *Id.* at 53-54. Recently, this Court has expanded these rules to proceedings other than state criminal prosecutions. *Schlesinger* v. *Councilman*, —— U.S. —— (Mar. 25, 1975) (military court-martial); *Huffman* v. *Pursue, Ltd.*, —— U.S. —— (Mar. 18, 1975) (state civil proceeding akin to criminal prosecution).

The decisions of the courts below, barring federal intervention in this case, clearly follow the precepts of *Younger* v. *Harris, supra*, and subsequent cases and in no way conflict with the holdings of other federal courts. Indeed, petitioner has failed to indicate how the instant case is of such a unique character as to require review by this Court. Quite the contrary, a brief analysis of the prerequisites for federal intervention in light of petitioner's claims indicates the correctness of the denial of relief by the District Court.

The "traditional prerequisite to obtaining an injunction" is a showing of irreparable injury which is "both great and immediate." *Younger* v. *Harris, supra* at 46;

Fenner v. *Boykin*, 271 U.S. 240, 243-44 (1926). One aspect of such injury is the lack of an adequate remedy in the state proceedings by which the federal plaintiff may assert his claim. *Younger* v. *Harris, supra* at 48-50. Most of the same claims which petitioner submitted in the District Court have been included in an omnibus motion to dismiss the indictment on jurisdictional grounds and in the interest of justice. *See* N. Y. Criminal Procedure Law §210.20 (McKinney 1971). That motion is now pending in the state trial court pursuant to the directive of the Appellate Division. *See People* v. *Steinman*, 44 A.D.2d 839 (2d Dept. 1974). In turn, it is "generally to be assumed that state courts and prosecutors will observe constitutional limitations" and that the "mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." *Dombrowski* v. *Pfister*, 380 U.S. 479, 484-85 (1965); *see Cameron* v. *Johnson*, 390 U.S. 611, 621 (1968). Here, the state trial court will presumably rule correctly on the questions of law and will hold, if necessary, an evidentiary hearing to determine factual issues relevant to those portions of the motion concerning prosecutorial misconduct. *See* N.Y. Criminal Procedure Law §210.45(6) (McKinney 1971).

Moreover, petitioner's allegation of prosecutorial misconduct as it relates to the affirmative defense of entrapment will be presented to and decided by the trial jury in its determination of petitioner's guilt or innocence. N. Y. Penal Law §40.05 (McKinney 1967). Further, all those issues raised in the trial court, including that of the trial judge's alleged bias, may be subject to full review by judg-

ment appeal in the Appellate Division and again in the New York Court of Appeals, by post-conviction remedy [*see* N. Y. Criminal Procedure Law §440.10 (McKinney 1971)], by certiorari in this Court, and by habeas corpus and additional appeal in the federal courts. *O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Watson* v. *Buck*, 313 U.S. 387, 401 (1941); *Canal Theatres, Inc.* v. *Murphy*, 473 F. 2d 4, 6 (2d Cir. 1973); *Leslie* v. *Matzkin*, 450 F. 2d 310 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

A federal plaintiff could also demonstrate great and immediate injury by showing that prosecutorial misconduct is presently continuing and thus may not be subject to attack in a pending case unrelated to the misconduct. *See, e.g., Dombrowski* v. *Pfister, supra* (police continued to threaten prosecution, even though vital evidence was ordered suppressed by a state court); *Inmates of Attica Correctional Facility* v. *Rockefeller, supra* (injunctions only allowed against continuing brutality in state prison). In the instant case, petitioner alleged no continuing misconduct. All the alleged misconduct has already occurred and is subject to challenge in the state prosecution. Again, no irreparable injury is indicated.

The second ground for federal intervention is a showing that the state prosecution has been brought in bad faith or to harass the party seeking relief. *Younger* v. *Harris, supra* at 49. Petitioner urged, more specifically in the Court of Appeals than in the District Court, that the instant prosecution has been brought in bad faith, and, in this respect, he pointed to his allegations of prosecutorial misconduct. Bad faith or harassment prosecutions, however, have been specifically defined as those brought "without hope of obtain-

ing a valid conviction" [*Perez* v. *Ledesma, supra* at 85] or with "no intention of pressing the charges * * *, knowing that [the defendant] did not violate the [criminal] statute." *Cameron* v. *Johnson, supra* at 619-20. In other words, the prosecution must be shown to have a "sham case." *Citizens for a Better Environment, Inc.* v. *Nassau County,* 488 F. 2d 1353, 1360 (2d Cir. 1973); *see, e.g., Dombrowski* v. *Pfister, supra; Shaw* v. *Garrison,* 467 F. 2d 113 (5th Cir. 1972), *cert. denied,* 409 U.S. 1024 (1972). No such showing has been made of the instant state prosecution, where it is undisputed that the acts alleged in the indictment would, if proved, constitute conspiracy, attempted bribery and grand larceny.

It is necessary to point out that the tactics allegedly used by the prosecution here, specifically by the United States Attorney before the case was transferred to the Special State Prosecutor for lack of federal jurisdiction—*i.e.*, employing a fictitious indictment to investigate corruption in the criminal justice system—have been questioned in other cases. *See, e.g., Matter of Nigrone* v. *Murtagh,* —— N.Y.2d —— (Apr. 3, 1975), *aff'g* 46 A.D.2d 343 (2d Dept. 1974); *United States* v. *Archer,* 486 F.2d 670 (2d Cir. 1973). But, while not the case here, even a prosecution brought upon a clear constitutional infirmity does not constitute bad faith. *See Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943) (no bad faith even though prosecution was brought under a statute found unconstitutional by this Court). The state court is still assumed to "observe constitutional limitations." *Dombrowski* v. *Pfister, supra* at 484-85.

Moreover, unlike the situation in *Douglas* v. *City of Jeannette, supra,* the constitutional propriety or impro-

priety of the prosecutorial tactics used here is far from clear. And, indeed, the state appellate courts have overwhelmingly found, both in petitioner's and other cases, that such questions of prosecutorial misconduct should be resolved at the trial level. *Matter of Nigrone* v. *Murtagh, supra; People* v. *Steinman, supra; Matter of Klein* v. *Murtagh,* 44 A.D. 465, 473-74 (2d Dept. 1974) (SHAPIRO, J., concurring), *aff'd,* 34 N.Y. 2d 988 (1974). Petitioner's claims thus should await further adjudication in the trial court, both as a ground for dismissal and as a statutory defense. It cannot be said that the prosecution has been brought "without hope of obtaining a valid conviction." *Perez* v. *Ledesma, supra* at 85.

The last exception to the bar to federal intervention was defined in *Younger* v. *Harris, supra* at 53-55, as "extraordinary circumstances," an example of which was there given in a quotation from *Watson* v. *Buck, supra* at 402:

> "It is of course conceivable that a statute might be flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it."

None of the statutes challenged by petitioner presents such an infirmity.

Petitioner's first attack is directed at article VI, section 27, of the New York State Constitution and its implementing statute, section 149, subdivision 1, of the New York Judiciary Law, both of which provide that the Governor may, when "the public interest requires," appoint one or more extraordinary special and trial terms of the

New York Supreme Court and may name "the justice who shall hold the term"; further, the Governor "may terminate the assignment of the justice and may name another justice in his place to hold the term." N.Y. CONST. art. VI, §27 (McKinney 1969); N.Y. Judiciary Law §149 (1) (McKinney 1968). By this procedure, the Governor, as he did at the same time in the other four counties of New York City, established the Extraordinary Special and Trial Term of the Supreme Court, Kings County, for the trial of cases brought by the Special Prosecutor, and named Mr. Justice JOHN M. MURTAGH to preside at the term. Exec. Order No. 64, 9 NYCRR 1.64. Petitioner claims that this procedure allows the Governor to appoint and remove a judge at will and thus violates the separation of powers doctrine of the United States Constitution and the independence of the judiciary. He is wrong.

To begin with, at least one federal court having an opportunity to discuss this procedure on the merits has found it to comply with due process standards. *United States ex rel. Monty* v. *McQuillan*, 385 F. Supp. 1308 (E.D.N.Y. 1974), *aff'd*, 2d Cir., Docket No. 75-2012 (May 1, 1975) (no opinion). Moreover, with respect to the trial justice, the Governor's power consists only of appointment, when the public interest requires, and removal, presumably when the assigned justice has become unable or unwilling to continue in his position. Further, the power of terminating the assignment and naming another justice to hold the term has not even been exercised as to this Extraordinary Term.* And for the Governor to abuse his authority and

* Interestingly, it was petitioner himself who sought to have this power of removal invoked, albeit improperly, in his motion before the Appellate Division and, by inference, in the District Court below (Nussbaum affidavit, June 10, 1974, pp. 33-35).

make his appointments for any purpose other than in the public interest would be a "violation of [the] law" under attack. *People* v. *Davis*, 67 Misc. 2d 14, 16 (Sup. Ct., Extraordinary Special and Trial Term, Ontario Co. 1971).

In sum, the extraordinary term is "to be conducted in accordance with the rules of law governing all the other terms of court with the exception of the designation of the judge." *Matter of Reynolds* v. *Cropsey*, 241 N.Y. 389, 395 (1925). The procedure in no way creates a tribunal with a built-in personal or pecuniary interest in the outcome of a trial. *Cf. Gibson* v. *Berryhill*, 411 U.S. 564 (1973); *In re Murchison*, 394 U.S. 133 (1955); *Tumey* v. *State of Ohio*, 273 U.S. 510 (1927). Indeed, if the trial judge is unbiased, petitioner would have no ground to complain. *United States ex rel. Monty* v. *McQuillan*, *supra* at 1311. And if the judge is biased against petitioner, the latter has an adequate remedy at state law for seeking the judge's disqualification. N.Y. Judiciary Law §14 (McKinney 1968); 22 NYCRR 33.3(c) (N.Y. Judicial Conference).

Petitioner's additional argument that this state procedure of establishing an extraordinary term violates the separation of powers doctrine of the United States Constitution is likewise without merit. The Constitution contains no requirement that the structure of state governments conform exactly to the structure of the national government; the federal separation of powers doctrine does not apply to the states. *Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902); *cf. United States* v. *Brown*, 381 U.S. 437, 442-43 (1965). In fact, all that the Constitution requires of each state is a "Republican Form of Government" [U.S. Const.

art. IV, §4], the existence of which here is demonstrated by the fact that the People of the State of New York themselves voted to adopt the very state constitutional provision under attack. *See* N.Y. CONST. art. XIX, §1 (McKinney 1969).

Another challenged statute, section 149, subdivision 2, of the New York Judiciary Law, provides that the Appellate Division, in its discretion, may hear a motion addressed to an extraordinary special and trial term. The existence of such discretion does not, as petitioner claims, deny him equal protection of the law. For the use of sound judicial discretion is not uncommon to state or federal courts in setting bail, imposing sentence or granting leave to appeal, or to this Court in granting certiorari. Finally, there is no showing that the Appellate Division has practiced invidious discrimination or unreasonable distinctions in deciding whether to entertain a pre-trial motion. *Cf. Williams* v. *Oklahoma City*, 395 U.S. 458 (1969); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Griffin v. People of the State of Illinois*, 351 U.S. 12 (1956).

The last challenged statute, section 63, subdivision 2, of the New York Executive Law, provides that the Attorney General or one of his deputies (in this case, the Special State Prosecutor, pursuant to the Governor's Executive Order Number 58, 9 NYCRR 1.58), shall, upon request of the Governor, supersede a local district attorney, and prosecute a certain case or class of cases. Petitioner's argument that the Special Prosecutor abused his authority by engaging in various forms of misconduct is not a challenge to the constitutionality of a statute, but is merely a reword-

ing of his challenge to respondent's conduct.* *See Phillips* v. *United States*, 312 U.S. 246, 252 (1941).

In sum, the state provisions challenged are not "violative of express constitutional prohibitions in every clause, sentence and paragraph" as to create an extraordinary circumstance calling for federal intervention. *Younger* v. *Harris, supra* at 53-55; *Watson* v. *Buck, supra* at 402. Any challenge to their constitutionality should be made in the state court, and petitioner has made such a challenge in his pending motion to dismiss the indictment.

Finally, it should be noted that the constitutional nature of petitioner's claims of prosecutorial misconduct is highly questionable and may in fact be "nonexistent," thereby depriving him of any ground for a civil rights complaint. *See Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962). Thus, the investigative techniques allegedly used may well involve only the "nonconstitutional" defense of entrapment. *United States* v. *Russell*, 411 U.S. 423, 432-33 (1973); *see* N.Y. Penal Law §40.05 (McKinney 1967). And even if the defense here is a due process claim, the District Court correctly noted that *United States* v. *Archer, supra*, was "not decided in the context presented here, *i.e.*, where a federal

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* At the time the District Court entertained petitioner's application for a three-judge court, section 63 of the New York Executive Law was the only challenged state statute included in petitioner's papers. But since the allegation was directed at the Special Prosecutor's conduct and not at the constitutionality of a state statute, the application was properly denied, since it did not conform to the three-judge statute. Petition, pp. A-1-5; 28 U.S.C. §§2281, 2284. When petitioner subsequently submitted his challenges to article VI, section 27, of the New York Constitution and section 149 of the New York Judiciary Law, the District Court properly refrained from reconsidering the application since the constitutional questions were clearly not substantial as to warrant the convening of a three-judge panel. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). The Court of Appeals affirmed this decision, finding that the "claims relating to the constitutionality of the State statutes are frivolous." Petition, p. SA-4.

court is asked to interfere with a pending state prosecution. Plaintiff has a forum where he can assert these due process violations." Petition, p. A-10. Petitioner's further allegation that he was not, before indictment, afforded a prompt arraignment or preliminary hearing concerns a violation, if any, of state, not constitutional, law. *See* N.Y. Criminal Procedure Law §§140.20, 180.60, 180.70 (McKinney 1971); *cf. Mallory* v. *United States,* 354 U.S. 449 (1957); *McNabb* v. *United States,* 318 U.S. 332 (1943); FED. R. CRIM. P. 5, 5.1. Whatever the meaning of his statements in the District Court that he was held "incommunicado," it was never asserted that during the three months before indictment, when the prosecution sought his cooperation in investigating corruption, he was incarcerated in jail or physically prevented from seeing an attorney. *Cf. Gerstein* v. *Pugh,* —— U.S. —— (Feb. 18, 1975); *Coleman* v. *Alabama,* 399 U.S. 1 (1970). Rather, it appears that his indictment was delayed for a determination of whether he would become an informant; throughout that time he remained at liberty, as he does now. Additionally, no constitutional questions are involved in an apparent violation of a state court order to seal court papers or in an obvious misunderstanding over what the former Chief Judge said to whom. All these questions may and should be resolved in the state court.

Petitioner demonstrated none of the extraordinary circumstances required to invoke federal intervention into a pending state criminal prosecution. As the Court of Appeals correctly perceived, "this is a classic case for restraint in invoking federal equitable relief, out of respect for State processes." Petition, p. SA-4. The dismissal of the complaint was in full accord with the guidelines established by this Court and in harmony with the principles of federalism. Petitioner's claim is thus not sufficiently substantial to warrant the granting of a writ of certiorari.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May, 1975.